IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.K.MOHANAN

WEDNESDAY, THE 17TH OCTOBER 2007 / 25TH ASWINA 1929

Crl.MC.No. 746 of 2004()

AGAINST CC.40/2004 of JUDL.MAGISTRATE OF FIRST CLASS-I, ALUVA

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PETITIONER: ACCUSED NO.1

THE SECRFETARY,
ALUVA MUNICIPALITY, ALUVA.

BY ADV. SRI.V.M.KURIAN
SRI.A.V.THOMAS
SRI.MATHEW B. KURIAN
SRI.K.T.THOMAS

RESPONDENTS:

STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM

BY PUBLIC PROSECUTOR

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 17/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

CRL. M.C. NO. 746/2004

Order on Crl. M. Appln. No. 3437/04 in Crl.M.C. No. 746/04.

DISMISSED.

17/10/2007 Sd/-(V.K.MOHANAN, JUDGE)

V.K.MOHANAN, J.

Crl. M.C. No. 746 of 2004

Dated, this the 17th day of October, 2007

O R D E R

The petitioner herein is accused No. 1 in CC No. 40/2004 on the file of the Judicial First Class Magistrate Court-I, Aluva, who approached this Court by filing the above Crl. Miscellaneous Case to quash Annexure 6 summons issued against him and all proceedings in CC No. 40/2004 pending before the court below.

2. Brief facts of the case is that the peon attached to the court below submitted a report before the Presiding Officer of the court below stating that on 22/06/2003 at about noon when he was coming back after lunch, he saw that some persons were engaged in cutting and removal of branches of trees standing in the court compound and on his enquiry with the workers, who were on the top of the tree, they told him pointing out the contractor who was standing in the nearby municipal stadium, that the branches of the trees were cut and removed as directed by the said contractor. According to the peon, when he contacted the contractor, he was told that the Municipality has obtained sanction from the Magistrate concerned. It is also stated in the report filed by the said peon,

which is marked as Annexure 1, that certain damages were caused to the compound wall of the court complex. Based on Annexure 1 report of the said peon, the Magistrate has issued Annexure 2 show cause notice to which the petitioner has submitted Annexure 3 explanation. Having dissatisfied with the explanation offered by the petitioner-accused, the Magistrate issued Annexure 4 notice calling for the explanation from the petitioner for not taking cognizance under Section 427 and 447 of IPC. To the above notice, the petitioner submitted Annexure 5 explanation. Thereafter, the court below took cognizance against the accused for the offence under Section 427, 447 read with Section 34 of the IPC and instituted CC No. 40/2004. After institution of the above case, the Magistrate issued Annexure 6 summons to the petitioner and at that stage, the petitioner approached this Court with a prayer to quash Annexure 6 summons and all proceedings against him in CC No. 40/2004 pending before the court below.

3. I have heard the learned counsel for the petitioner as well as the learned public prosecutor.

4. Annexure 1 contains the allegation, which is the basic

material for instituting the case against the petitioner-accused as well as the other persons. Going by Annexure 1, it can be seen that the alleged act of cutting and removal of branches of the tree was done by certain workers. Even according to the peon, who submitted the report, the said workers were engaged and worked as directed by the contractor. There is no allegation attributing any role to the petitioner-accused in connection with the above act. The person, who submitted Annexure 1 report, has no case that the Secretary was personally present at the time of the commission of the alleged offence or he was indirectly responsible for the same. What he says in the report is that the Municipality has obtained sanction from the Magistrate concerned for doing the said act. It is not discernible from the above report, whether the Secretary had accorded sanction. Thus going by Annexure 1 report, it can be seen that there is no allegation or averments against the petitioner-accused to attract any offence against him.

4. The learned counsel appearing for the petitioner submits that the petitioner who is acting as the Secretary of the Aluva Municipality is a "public servant" as defined under Explanation 12th

to Section 21 of the Indian Penal Code. Explanation 12th to Section 21 of the IPC reads as follows :-

> "21. Every person --
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> (a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government.
>
> (b) in the service or pay of a local authority, a corporation established by or under a central, provincial or state Act or a government company as defined in Section 617 of the Companies Act 1956."

Besides the above, Section 553 of the Kerala Municipality Act, 1994 says that

> "553. Application of term public servant to officers and employees of Municipality, agents and sub agents – Every officer or employee of a municipality, every contractor or agent for the collection of any municipal tax, fee or other sum due to the municipality and every person employed by any such contractor or agent for the collection of such tax, fee or sum shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code, 1860."

Thus every officer or employee of Municipality is coming within the meaning under Section 21 of IPC, on the strength of the above provisions of both the IPC as well as the Kerala Municipality Act. The learned counsel for the petitioner submits that taking of cognizance by the Magistrate against the petitioner is illegal especially in the light of the provisions contained under Section 197 of the Code of Criminal Procedure. Section 197 (1) Clause (b) of Cr.PC says that -

> "197 – Prosecution of Judges & Public Servants :- (1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction.
>
> (a) --
>
> (b) In the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State of the State Government."

In the present case, no previous sanction was obtained for taking cognizance against the petitioner. Therefore, the learned counsel for the petitioner submits that the entire proceedings adopted by the court below is vitiated. On the otherhand, the learned Public Prosecutor by inviting the attention to Section 340 of Cr.PC, it is submitted that the Magistrate has adopted the procedure prescribed under Section 340 of Cr.PC and therefore, there is no illegality. Controverting the above submission, the learned counsel for the petitioner submits that in the light of the decision in **Thomas Vs. Musthafa** reported in 1981 KLT 749, obtaining of previous sanction is a condition precedent for taking cognizance against the petitioner, who is a public servant coming within the definition of Section 21 of IPC and therefore, in the absence of previous sanction obtained as envisaged under Section 197 of the Cr.PC, the proceedings initiated by the Magistrate is unsustainable.

5. As I have pointed out earlier, Annexure 1 report, which is the basic material on the strength of which proceedings were initiated against the petitioner, do not disclose any offence against the petitioner. From the statement, contained in Annexure 1

report, no offence is disclosed against the petitioner. No specific allegation or overt act against the petitioner. What are all seen to have done by the workers cannot be treated as an offence so as to initiate proceedings against the petitioner. Therefore, I am of the view that no offence is disclosed against the petitioner and therefore, the proceedings adopted by the court below in taking cognizance against the petitioner is vitiated and the same is liable to be set aside.

6. Going by Section 197 of Cr.PC, it can be seen that unless there is previous sanction from the appropriate authority, no court can take cognizance against a public servant. Here, the petitioner is the Secretary of the Aluva Municipality who is coming within the definition of Section 21, Explanation 12 of IPC. Apart from that, Section 553 of the Kerala Municipality Act is also similarly worded as that of Section 21 of IPC. Hence Section 197 of the Cr.PC is attracted. Hence without previous sanction of the Government, no cognizance can be taken against the petitioner who is acting as a Secretary. Therefore, I have no hesitation to hold that the act of taking of cognizance against the petitioner

without previous sanction of the State Government under Section 197 of Cr.PC is illegal and hence the same is liable to be quashed.

7. In the light of the above discretion, I am of the view that no offence under Section 427 and 447 are disclosed against the petitioner and as no previous sanction was obtained before taking cognizance against the petitioner as envisaged under Section 197 of the Cr.PC as well as Section 548 of the Kerala Municipality Act, Annexure 6 summons and all proceedings in CC No. 40/2004 on the file of the Judicial First Class Magistrate Court-I, Aluva are liable to be quashed. Accordingly, the same are quashed.

The Criminal Miscellaneous Case is allowed.

(V.K.MOHANAN, JUDGE)

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